

**Town of Rockport  
Zoning Board of Appeals**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. Overview**

Appellants: David Barry (Lot 271, Map 29); David Kantor and Michael Hampton (Lot 129-2, Map 39); John Priestley (Lot 35, Map 30 and Lot 131-3, Map 30); Mark Schwarzman (Lot 99, Map 22); and Winston Whitney (Lot 129-1, Map 20).

Decision Under Appeal: Town of Rockport Code Enforcement Officer's issuance of Building Permit # 6843 (the "Permit") dated March 10, 2021 to 20 Central Street, LLC for construction of a 26-room hotel and restaurant at 20 Central Street, Rockport, Maine (Lot 293, Tax Map 029).

Summary of Issues on Appeal and Proceedings: The Appellants contend that the Code Enforcement Officer ("CEO") erroneously issued the Permit to 20 Central Street, LLC based upon the following grounds:

- a. The CEO erroneously failed to apply Section 917, Footnote 9, of the Town of Rockport's 2020 Land Use Ordinance ("LUO") to 20 Central Street, LLC's building permit application. Footnote 9 to Section 917 provides that "[n]o single inn or hotel, nor any combination of such uses located on the same lot, shall have more than 20 guest rooms." Consequently, the Appellants contend that the Permit erroneously authorized 20 Central Street, LLC to construct a 26-room hotel, when the LUO only authorizes the construction of a 20-room hotel.
- b. The CEO erred by failing to make an independent finding that 20 Central Street, LLC's proposed hotel meets the architectural review standards in § 1003 of the LUO. The Appellants contend that the Planning Board did not have jurisdiction to apply the architectural review standards in § 1003 to 20 Central Street, LLC's site plan review application when it initially reviewed and approved the proposed hotel. The Appellants argue that it was the CEO's responsibility to review 20 Central Street, LLC's proposed hotel for conformance with the architectural review standards in § 1003, that he did not do so, and that he erroneously granted the Permit because the proposed hotel does not meet the standards of § 1003. More specifically, the Appellants contend that the proposed hotel is not visually harmonious with the surrounding structures and the overall appearance of the neighborhood. The Appellants further argue that the proposed hotel will eliminate scenic views from the main road, Goodridge Park, and abutting structures in contravention of the provisions of § 1003 of the LUO.
- c. The CEO erred by failing to make an independent finding that 20 Central Street, LLC's proposed hotel would not cause nuisance conditions under § 801.7 of the LUO, as a result of noise and light that will be generated by the hotel, and the restaurant within the hotel. The Appellants argue that the Planning Board did not have jurisdiction to apply the nuisance standards contained in Chapter 800 of the LUO to 20 Central Street, LLC's site plan review application when it reviewed and approved the proposed hotel, and therefore, the CEO was required to make an independent finding that the

proposed hotel will conform to the standards in § 801.7. The Appellants further contend that noise and light generated by both the restaurant located on the top floor of the proposed hotel, and from hotel guests using their balconies, will violate the provisions of Chapter 800.

- d. The CEO erroneously issued a building permit that authorizes 20 Central Street, LLC to construct a hotel that materially differs from the Planning Board's approved site plan for the proposed hotel, and thus the CEO's issuance of the building permit contravenes § 1306 of the LUO. More specifically, the Appellants contend that:
  - (i) The Permit authorized 20 Central Street, LLC to use the restaurant on the top floor of the proposed hotel for conferences and weddings, which constitutes an assembly use that was not reviewed and approved by the Planning Board when it initially considered 20 Central Street, LLC's site plan review application.
  - (ii) The Permit authorizes 20 Central Street, LLC to construct a retractable roof, which was neither reviewed nor approved by the Planning Board, on the top floor of the proposed hotel.
  - (iii) The Permit authorizes 20 Central Street, LLC to alter the front and rear façade of the proposed hotel in several respects that materially differ from the approved site plan for the proposed hotel.
- e. The Sandy's Way parking lot, which will provide parking to guests visiting the proposed hotel, was conveyed to 20 Central Street, LLC, which constitutes a material change from the approved site plan for the proposed hotel, and therefore requires additional review and approval from the Planning Board.

In opposition to the foregoing grounds of appeal, 20 Central Street, LLC contends that § 707 of the LUO, which prohibits the "Reapplication for Appeal" in certain circumstances, bars the Appellants from asserting the following grounds in the instant appeal: 1) 20 Central Street, LLC's proposed hotel fails to meet the architectural review standards in § 1003 of the LUO, 2) 20 Central Street, LLC's proposed hotel would cause nuisance conditions pursuant to § 801.7 of the LUO, and 3) the conveyance of the Sandy's Way parking lot violates the previous site plan approval for 20 Central Street, LLC's proposed hotel. 20 Central Street, LLC also contends that the application of § 917, Footnote 9, would result in nullification of the Planning Board's site plan approval for 20 Central Street, LLC's proposed hotel in contravention of 30-A M.R.S. § 3007(6).

### Procedural History

This Zoning Board of Appeals ("Board") held a public hearing on the Appellants' appeal on June 30, 2021,<sup>1</sup> and July 8, 2021. On July 8, 2021, it considered draft findings and took a final vote on the appeal.

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<sup>1</sup> At the June 30<sup>th</sup> Hearing, Board member Kimberlee Graffam voluntarily recused herself from the proceeding to avoid any perception of a conflict of interest.

The Appellants were represented by Attorney Kristin Collins; 20 Central Street, LLC was represented by its principal, Tyler Smith, Attorneys Andre Duchette and Mark Coursey, and Engineer William Gartley; the CEO was represented by Town Attorney, Philip Saucier; and Attorney Leah Rachin acted as counsel to this Board.

## **II. Findings of Fact:**

- 1) On February 27, 2020, the Town of Rockport (“Town”) Planning Board voted to approve 20 Central Street, LLC’s Site Plan Review application to construct a 26-room hotel and restaurant at 20 Central Street, Rockport, Maine, which is identified by the Town as Lot 293 on Tax Map 029. The subject property is located in the Rockport Downtown (913) zone.
- 2) On May 21, 2020, the Planning Board voted to adopt written findings of fact consistent with the Planning Board’s February 27, 2020 approval of 20 Central Street, LLC’s Site Plan Review application (“May 21<sup>st</sup> Approval”).
- 3) On June 22, 2020, David Barry, Lisa Breheny, Katherine Grealish, David Kantor and Michael Hampton, George and Eliza Haselton, John Priestley, Kimberly and Rex Rehmyer, Mark Schwarzman, Craig Sweeny, and Winston Whitney appealed the Planning Board’s approval of 20 Central Street, LLC’s Site Plan Review application to the Town Zoning Board of Appeals pursuant to § 703.2 of the LUO (“2020 Appeal”).
- 4) The 2020 Appeal contended that the Planning Board made errors of law, abused its discretion, and made findings of fact not supported by substantial evidence in the record by approving 20 Central Street, LLC’s Site Plan Review application. The 2020 Appeal asserted that the Planning Board’s decision should be reversed based, in part, upon the following grounds:
  - (i) 20 Central Street, LLC’s application failed to meet the parking requirements of the LUO.
  - (ii) 20 Central Street, LLC’s planned parking for the proposed hotel does not meet the requirements of the LUO because the Sandy’s Way lot is not located on the same lot as the proposed hotel.
  - (iii) The Planning Board erred in its application of the LUO’s architectural review standards to 20 Central Street, LLC’s Site Plan Review application under § 1003 of the LUO because the proposed hotel is not visually harmonious with the surrounding structures and the overall appearance of the neighborhood.
  - (iv) The Planning Board erred in finding that the proposed hotel would not cause nuisance conditions under §§ 801.6 and 801.7 of the LUO.
- 5) This Board held public hearings on the 2020 Appeal on November 17, 2020, December 1, 2020, December 9, 2020, and January 6, 2021.
- 6) On January 21, 2021, this Board voted 6-0 to deny the 2020 Appeal (“January 21<sup>st</sup> Decision”).

- 7) On January 22, 2021, the Board issued its written findings of fact and conclusions for the 2020 Appeal.
- 8) The January 21<sup>st</sup> Decision, and the Planning Board's site plan approval for 20 Central Street, LLC's proposed hotel, was subsequently appealed to the Knox County Superior Court. That appeal is currently pending before the Court.
- 9) On March 10, 2021, the CEO issued the Permit authorizing 20 Central Street, LLC to construct a 26-room hotel at 20 Central Street.
- 10) On April 9, 2021, David Barry, David Kantor and Michael Hampton, Mark Schwarzman, Winston Whitney, and John Priestley (hereinafter the "Appellants") filed this appeal with the Board.

### **Appellants' Standing**

- 11) Appellant David Barry owns property located 1 Mechanic Street, Rockport, Maine, which is depicted on the Town's tax maps as Lot 271 on Map 29.
- 12) Appellants David Kantor and Michael Hampton own property located at 32 Main Street, Rockport, Maine, which is depicted on the Town's tax maps as Lot 129-2 on Map 39.
- 13) Appellant Mark Schwarzman owns property located at 33 Mechanic Street, Rockport, Maine, which is depicted on the Town's tax maps as Lot 99 on Map 22.
- 14) Appellant Winston Whitney owns property located at 30 Main Street, Rockport, Maine, which is depicted on the Town's tax maps as Lot 129-1 on Map 20.
- 15) Appellant John Priestley owns property located at 71 Main Street (Map 30, Lot 35), and 23 Central Street (Map 30, Lot 131-3) in Rockport, Maine.
- 16) Appellant John Priestley's owns property located at 23 Central Street in Rockport. Appellant Priestley operates a business from the 23 Central Street location.
- 17) Although Appellant Priestley's property does not directly abut the location of 20 Central Street, LLC's proposed hotel, it is close in proximity.
- 18) Appellant Priestley's clients and employees will be affected by increased traffic and/ or difficulty parking on Central Street, resulting from 20 Central Street, LLC's proposed Hotel.
- 19) To the greatest extent possible given the practical limitations of the building permit approval process, Appellant Priestly and the other Appellants participated in the CEO's consideration of the 20 Central Street, LLC's building permit application by raising their objections with him, through their attorney.

## **Board's Jurisdiction**

A number of jurisdictional issues have been raised by the parties. We address each of them, separately, below.

### **A. Section 707 of the LUO<sup>2</sup>**

20) This appeal affects the same premises previously at issue in the 2020 Appeal.

21) This appeal was filed with the Board on April 9, 2021.

22) This appeal was filed within six (6) months of the Board's January 21<sup>st</sup> Decision.

### **i. Architectural Review Standards**

With respect to 20 Central Street, LLC's assertion that Section 707 of the LUO bars consideration of the Appellants' arguments relating to architectural review standards, we find as follows:

23) Section 1304 of the LUO provides that a site plan must contain "[e]levations drawn to scale detailing the proposed siding and roofing materials, sizes of door and window openings and other features which may assist the Planning Board in making appropriate findings related to Architectural Review as noted in Section 1003 of this Ordinance."

24) Section 1304 indicates that the LUO requires the Planning Board to review site plan review applications for conformance with the architectural review standards enumerated in § 1003.

25) The Board previously reviewed and considered whether 20 Central Street, LLC's proposed hotel failed to meet § 1003's architectural review standards when considering the 2020 Appeal. In the January 21<sup>st</sup> Decision, the Board concluded that 20 Central Street, LLC's proposed hotel met § 1003's architectural review standards.

26) The Appellants have not presented substantial new evidence demonstrating that an error or mistake of law, or misunderstanding of fact, has been made with respect to the determination that 20 Central Street, LLC's proposed hotel conforms with the architectural review standards in § 1003.

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<sup>2</sup> Section 707 of the LUO provides as follows:

If the Board of Appeals shall deny an appeal, a second appeal affecting the same premises and requiring a similar decision shall not be heard by the Board within 6 months from the date of the denial by the Board of the first appeal, unless in the opinion of four (4) members of the Board, substantial new evidence shall be brought forward, or unless four (4) members of the Board find, in their sole and exclusive judgment, that an error or mistake of law or misunderstanding of fact has been made.

## **ii. Nuisance Conditions**

With respect to 20 Central Street, LLC's assertion that Section 707 of the LUO bars consideration of the Appellants' arguments relating to nuisance conditions, we find as follows:

- 27) The Board previously reviewed and considered whether 20 Central Street, LLC's proposed hotel would cause nuisance conditions pursuant to the provisions of Chapter 800 of the LUO. In the January 21<sup>st</sup> Decision, the Board concluded that 20 Central Street, LLC's proposed hotel would not cause nuisance conditions.
- 28) The Appellants have not presented substantial new evidence demonstrating that an error or mistake of law, or misunderstanding of fact, has been made with respect to the determination that 20 Central Street, LLC's proposed hotel will not cause nuisance conditions.

## **iii. Parking Requirements**

With respect to 20 Central Street, LLC's assertion that Section 707 of the LUO bars consideration of the Appellants' arguments relating to parking requirements, we find as follows:

- 29) The Board previously reviewed and considered whether there was sufficient parking in the Sandy's Way parking lot to accommodate 20 Central Street, LLC's proposed hotel use. In the January 21<sup>st</sup> Decision, the Board concluded that Sandy's Way parking lot provided adequate parking for 20 Central Street, LLC's proposed hotel use.
- 30) The Appellants have not presented substantial new evidence demonstrating that an error or mistake of law, or misunderstanding of fact, has been made with respect to the adequacy of the Sandy's Way lot for 20 Central Street, LLC's proposed hotel use.

## **B. Interpretation of 30-A M.R.S. § 3007(6)**

With respect to whether this Board has jurisdiction to consider and/or apply 30-A M.R.S. § 3007(6), we make the following findings:

- 31) Section 703 of the LUO vests the Board with the authority "[t]o interpret provisions of this Ordinance which are called into question."
- 32) The version of the LUO that was in effect when the Planning Board granted site plan approval for 20 Central Street, LLC's proposed hotel was approved by town meeting on June 12, 2018. That version of the LUO allowed 26-room hotels in the zoning district in which the proposed hotel is located. It also did not require a traffic study to be conducted when a project contemplates shared or off-site parking
- 33) The LUO was subsequently amended by town meeting vote on August 18, 2020 to provide that "[n]o single inn or hotel, nor any combination of such uses located on the same lot, shall have more than

20 guest rooms.” It was also amended to require a traffic study when a project contemplates shared or off-site parking. This was the version of the LUO that was in effect at the time the CEO issued the Permit.

### **Material Changes from the Approved Site Plans for 20 Central Street, LLC’s Proposed Hotel**

#### **A. Assembly Use**

- 34) 20 Central Street, LLC’s principal, Tyler Smith represented that the top floor restaurant of the proposed hotel might be used for weddings and conferences but that any such events would be limited to 60 persons consistent with its Planning Board approval. He further represented that in the event that 20 Central Street, LLC wished to expand said capacity beyond 60 persons, then it would seek and obtain all necessary approvals from the Town prior to doing so.
- 35) There is no evidence that 20 Central Street, LLC’s building permit application proposed an assembly use for the top floor restaurant of 20 Central Street, LLC’s proposed hotel. In support of this claim, the Appellants submitted a conference style seating arrangement from the CEO’s building permit file showing a configuration that exceeded the 60 person limit. We accept 20 Central Street, LLC’s explanation that said plan was submitted in conjunction with requirements under the Life Safety Code to demonstrate maximum occupant load/capacity and not to seek authorization from the CEO for an assembly use.

#### **B. Retractable Roof**

- 36) The construction plans provided to and approved by the Code Enforcement Officer depict a portion of the top-floor restaurant with sliding skylights that can be open or enclosed based upon weather. This is in keeping with the testimony before the Planning Board which discussed, among other things, a restaurant similar to what is located on the roof at 16 Bay View but would be able to be enclosed in the winter time, with half of the restaurant being enclosed and half outside and a section that can be closed off for foul weather.
- 37) Testimony was presented by 20 Central Street, LLC’s principal, Tyler Smith who confirmed that the area in question is a 3 paneled skylight of which only two of the panels can open and this testimony is in line with the testimony he presented to the Planning Board in regards to the amount of area located inside the restaurant and outside the restaurant.

### **III. Standard of Review**

Pursuant to § 702 of the LUO and governing Maine law, the Board must apply a de novo standard of review to the Appellants appeal. As such, the Board took evidence, heard testimony, and permitted cross-examination during the course of the hearings that were held on June 30, 2021, and July 8, 2021.

#### **IV. Conclusions of Law**

What follows is this Board's conclusions on the various grounds of appeal asserted by the Appellants based upon the evidence presented and governing ordinances and Maine law.

##### **A. Standing**

In order to demonstrate the requisite standing to bring an appeal, a party must: 1) suffer a particularized injury greater than that suffered by the general public, and 2) participate in the proceeding that generated the subject of the appeal.

There is some question as to whether all of the named Appellants have sufficient standing to bring this appeal. However, because we find that Appellant, John Priestley does have standing, further inquiry into the other Appellants' standing is unnecessary. Appellant Priestley owns a business located in close proximity to the location of 20 Central Street LLC's proposed hotel. 20 Central Street LLC's proposed hotel may result in increased traffic in the area surrounding Appellant Priestley's business, and may decrease parking spaces that are currently available for his clients and employees. Consequently, Appellant Priestley has demonstrated that he could suffer a particularized injury from the construction and operation of 20 Central Street LLC's proposed hotel.

Additionally, we find that Appellant Priestley and the other Appellants sufficiently participated in the CEO's review and approval of 20 Central Street, LLC's building permit application. CEO review of a building permit does not typically allow for robust public participation. Nevertheless, Appellant Priestley, and the other Appellants through their attorney, raised their objections to 20 Central Street, LLC's proposed hotel with the CEO, and requested various documents from the CEO relating to his consideration of 20 Central Street, LLC's building permit application during the approval process.

Based on the foregoing, we conclude that at least one of the Appellants (Priestly) has demonstrated requisite standing for this appeal to proceed.

##### **B. Board's Jurisdiction**

###### **i. Section 707**

Section 707 of the LUO provides as follows:

If the Board of Appeals shall deny an appeal, a second appeal affecting the same premises and requiring a similar decision shall not be heard by the Board within 6 months from the date of the denial by the Board of the first appeal, unless in the opinion of four (4) members of the Board, substantial new evidence shall be brought forward, or unless four (4) members of the Board find, in their sole and exclusive judgment, that an error or mistake of law or misunderstanding of fact has been made.



We find that the Appellants' appeal affects that same premises as the 2020 Appeal, which was the subject of the Board's January 21<sup>st</sup> Decision. Additionally, we find that this appeal, which was filed with the Board on April 9, 2021, was filed within 6 months of the Board's January 21<sup>st</sup> Decision. For the reasons that follow, we find that the following three grounds of appeal are barred by operation of § 707 of the LUO.

## **1. Architectural Review Standards**

As an initial matter, the Board finds that the Planning Board had jurisdiction to review and apply § 1304's architectural review standards to 20 Central Street, LLC's proposed hotel when the Planning Board review and approved 20 Central Street, LLC's site plan review application for the proposed hotel. Section 1304 of the LUO provides that a site plan must contain "[e]levations drawn to scale detailing the proposed siding and roofing materials, sizes of door and window openings and other features which may assist the Planning Board in making appropriate findings related to Architectural Review as noted in Section 1003 of this Ordinance." (emphasis added). The Board concludes that this provision clearly demonstrates that the Planning Board has the authority to apply the standards in § 1003 to site plan review applications.

In turn, the Board concludes that it would have been improper for the CEO to reassess § 1003's architectural review standards given that the Planning Board had already determined that such standards were met.

The Board also concludes that it already reviewed and considered whether 20 Central Street, LLC's proposed hotel complied with the provisions of § 1003 when it heard, and denied, the Appellant's 2020 Appeal.<sup>3</sup> The Appellants have not presented substantial new evidence demonstrating that an error or mistake of law, or a misunderstanding of fact, was has been made with respect to the application of § 1003 to 20 Central Street, LLC's proposed hotel. Accordingly, § 707 of the LUO precludes us from considering this ground of appeal.

## **2. Nuisance Conditions**

The Board concludes that the Planning Board had the jurisdiction to consider whether 20 Central Street, LLC's proposed hotel would result in nuisance conditions that contravene §§ 801.6 and 801.7<sup>4</sup> of the LUO given its jurisdiction to consider the general performance standards contained in Chapter 800 of the LUO in conjunction with its review of any application before it.

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<sup>3</sup> Appellants assert that changes to the facade constitute a material change from the plan approved by the Planning Board. We disagree. We find any such changes to be de minimis, and thus immaterial. We also find that any arguments regarding the facade are also barred by § 707.6.

<sup>4</sup> While § 801.6 (governing general nuisance standards, including noise) was not specifically mentioned in their appeal submission dated April 2021, the Appellants and their attorney raised noise as a concern at various times throughout the hearing and we therefore include it in our analysis.

In turn, the Board finds that it was unnecessary for the CEO to conduct an independent examination of whether 20 Central Street, LLC's proposed hotel would result in nuisance conditions, where the Planning Board had already determined that such nuisance conditions would not result from the proposed hotel.

The Board concludes that it has already reviewed and considered whether 20 Central Street, LLC's proposed hotel would cause nuisance conditions, pursuant to §§ 801.6 and 801.7 of the LUO, when we heard, and denied, the Appellant's 2020 Appeal. The Appellants have not presented substantial new evidence demonstrating that an error or mistake of law, or a misunderstanding of fact, was made with respect to the determination that 20 Central Street, LLC's proposed hotel will not cause nuisance conditions. Accordingly, § 707 of the LUO precludes us from considering this ground of appeal.

### **3. Parking**

The Board concludes that it has already reviewed and considered whether the proposed parking within the Sandy's Way parking lot, for 20 Central Street, LLC's hotel guests, sufficiently meets the requirements of the LUO. The Board considered this issue when it heard, and denied, the Appellants 2020 Appeal. The Appellants have not presented substantial new evidence demonstrating that an error or mistake of law, or a misunderstanding of fact, was made with respect to the determination that the Sandy's Way parking lot provides sufficient parking for 20 Central Street, LLC's proposed hotel. Accordingly, § 707 of the LUO precludes us from considering this ground of appeal. Any additional issues raised by the Appellants regarding parking constitute enforcement issues, which exceed our jurisdiction to consider.

### **ii. Interpretation of 30-A M.R.S. § 3007**

As Appellants point out, Maine law is clear that local boards of appeal are creatures of statute and may only hear appeals of subjects that are specifically authorized by statute, charter, or local ordinance. Maine law is also clear that boards of appeal may not consider constitutional issues or determine the legal validity of ordinances. *See Minster v. Town of Gray*, 584 A.2d 646, 648 (Me. 1990).

Section 703 of the LOU outlines the powers and duties of this Board. The first subsection of 703 specifically grants the Board the power to "interpret provisions of this Ordinance which are called in to question." Here, the Appellants "call in to question" the proper interpretation of section 719, note 9 of the most recently enacted LUO, which was in effect at the time the Permit was issued. Note 9 limits hotels to no more than 20 rooms in the 913 zone where the proposed hotel is located. Yet, at the time the Planning Board approved the project, 26 rooms were allowed under the LUO then in effect.

Contrary to the Appellants' contention, this Board is not being called upon to determine the *validity* or *legality* of either ordinance. Rather, we simply need to determine which one of the two *applies* to the latest chapter of the challenge, which began with the appeal of the Planning Board's approval. Title 30-A MRS 3007(6) provides guidance as to how to do that. It states as follows:

A municipality may not nullify or amend a municipal land use permit by subsequent enactment, amendment or repeal of a local ordinance after a period of 45 days has passed after:

- A. The permit has received its lawful final approval; and
- B. If required, a public hearing was held on the permit.

For purposes of this subsection, “municipal land use permit” includes a building permit, zoning permit, subdivision approval, site plan approval, special exception approval or other land use permit or approval. For the purposes of this subsection, “nullify or amend” means to nullify or amend a municipal land use permit directly or to nullify or amend any other municipal permit in a manner that effectively nullifies or amends a municipal land use permit. This subsection does not alter or invalidate any provision of a municipal ordinance that provides for the expiration or lapse of a permit or approval granted pursuant to that permit following the expiration of a certain period of time.

Final approval was granted by the Planning Board on May 21, 2020. The amendments to the LUO at issue here were enacted on August 18, 2020. The 45 day deadline by which the Town Meeting could “nullify” the Planning Board approval by way of a subsequent amendment to the LUO would have been July 15, 2020. The August 18, 2020 amendments were therefore too late to nullify the Planning Board’s final approval because they were enacted more than 45 days thereafter. In essence, by asking us to apply the August 18, 2020 amendments to 20 Central Street, LLC’s building permit application, Appellants are asking this Board to “nullify” the Planning Board’s final approval of 20 Central Street, LLC’s hotel project. We conclude that this would be prohibited under the clear terms of 30-A M.R.S. 3007(6) and decline to do so.

**C. Material Changes From the Site Plan Approval for 20 Central Street, LLC’s Proposed Hotel.**

With respect to the Appellants’ claims that the plans ultimately approved by the CEO represent a material change from those approved by the Planning Board, we conclude they are not barred by § 707 of the LUO as they were not raised in the prior appeal (aside for changes to the façade as discussed in footnote 3 above). Accordingly, we consider the merits of these claims below.

**i. Assembly Usage**

The Board concludes that the CEO’s issuance of the building permit to 20 Central Street, LLC did not constitute an unpermitted assembly use in violation of § 1306 of the LUO.

In its relevant part, § 1306 states that “[a]ll construction performed under the authorization of a building permit issued for development within the scope of this Ordinance shall be in conformance with the approved site plan.”

Representatives of 20 Central Street, LLC testified during the hearing that 20 Central Street, LLC will likely hold conferences and events in the restaurant on the top floor of the proposed hotel, but that such events will be limited to 60 guests in accordance with the Planning Board’s approval. 20

Central Street, LLC did not propose to use the restaurant on the top floor of the hotel for assembly uses in the building permit application that was submitted to the CEO. We therefore conclude that the building permit issued by the CEO did not expressly authorize assembly uses within the proposed hotel. We also conclude that the conference style seating plan relied upon by the Appellants for its assembly use claim does not support that claim given that it was submitted in order to satisfy Life Safety Code requirements regarding maximum occupancy.

20 Central Street, LLC expressly acknowledged on the record that if it wanted to expand seating beyond 60 people, it would need to seek and obtain all necessary approvals from the Town before doing so. In the event that 20 Central Street, LLC exceeds the 60 guest limitation, this would become an enforcement matter, which is beyond the scope of our jurisdiction.

## **ii. Retractable Roof**

The Board concludes that the construction plans provided to and approved by the CEO depict a portion of the top-floor restaurant with sliding skylights that can be open or enclosed based upon weather. This is in keeping with the testimony before the Planning Board which discussed, among other things, a restaurant similar to what is located on the roof at 16 Bay View but would be able to be enclosed in the winter time, with half of the restaurant being enclosed and half outside and a section that can be closed off for foul weather. Testimony from by 20 Central Street, LLC's principal, Tyler Smith confirmed that the area in question is a 3 paneled skylight of which only two of the panels can open and this testimony is in line with the testimony presented to the Planning Board in regards to the amount of area located inside and outside the restaurant. Based on this evidence, this Board concludes that the roof design approved by the CEO does not constitute a material change from the site plan approved by the Planning Board.

## **V. Decision**

For the foregoing reasons, the Zoning Board of Appeals voted 6 to 0 to deny the Appellants' appeal of the CEO's decision to issue the Permit to 20 Central Street, LLC for construction of a 26-Room hotel and restaurant at 20 Central Street, Rockport, Maine.

Section 705.3 of the LUO provides that "[a]ppeals from decisions of the Board of Appeals may be taken by an aggrieved party to the Superior Court, pursuant to 30-A M.R.S.A. § 2691, within forty-five (45) days of the date of Appeals Board decision."



Dated: July 9, 2021

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Geoffrey C. Parker, Chair  
Rockport Zoning Board of Appeals